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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91233690
Party	Defendant Rusty Ralph Lemorande
Correspondence Address	RUSTY LEMORANDE 1245 NORTH CRESCENT HEIGHTS BLVD #B LOS ANGELES, CA 90046 UNITED STATES Email: lemorande@gmail.com
Submission	Other Motions/Papers
Filer's Name	Rusty Lemorande
Filer's email	lemorande@gmail.com
Signature	/Rusty Lemorande/
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1 **IN THE UNITED STATES PATENT AND TRADEMARK OFFICE**
2 **BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

3
4 IMAGE TEN, INC.

5 Opposer

Opposition No. [91233690](#)

6 v.

7 RUSTY LEMORANDE

8 Applicant

RUSTY LEMORANDE'S
PETITION TO COMMISSIONER

9
10 PROPOUNDING PARTY:

Rusty Lemorande ("Rusty")

RESPONDING PARTY:

Image Ten, Inc. ("Six Continents")

11 REQUEST SET NO.:

One

12 **INTRODUCTORY COMMENT RE FILING DATE**

13 **OF THIS PETITION**

14 Petitioner notes that per Trademark Rule 2.146(a)(3), a petition from an interlocutory
15 order of the Trademark Trial and Appeal Board must be filed no later than thirty days after the
16 issue date of the order from which relief is requested.

17 The Interlocutory Attorney filed its interlocutory order on December 14th, 2017. January
18 14th falls on a Sunday and January 15th is a Federal Holiday. Therefore, per rule, this Petition is
19 properly filed as of the first business day following the holiday.

20 **REQUEST FOR STAY**

21 Per Trademark Rule 2.146(g), the mere filing of a petition to the Director will not act as a
22 stay in any appeal or inter partes proceeding that is pending before the Trademark Trial and
23 Appeal Board, nor stay the period for replying to an office action in an application, except when
24 a stay is specifically requested and is granted.

25 Applicant hereby requests a stay of the opposition proceedings pending resolution of the
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1 matters described herein.

2 INTRODUCTION AND REASON FOR THIS PETITION

3 It is with great reluctance that Applicant writes this petition. A petition is appropriate
4 when a party is dissatisfied with an interlocutory order of the Board. That is the case here.

5 In the Interlocutory Attorney's (hereinafter "IA") collected response to Applicant's **four**
6 **motions**, there appears to be such a wholesale avoidance of Applicant's arguments that further,
7 review by the IA seems pointless.
8

9 For example, the IA states: "*A motion to compel must be supported by a written statement*
10 *that the moving party has made a good faith effort, by conference or correspondence, to resolve*
11 *with the other party or its attorney the issues presented in the motion, and has been unable to*
12 *reach agreement....*"

13
14 "...It was incumbent upon Applicant, prior to filing his motions, to make at least one
15 additional inquiry. See *Hot Tamale Mama*, 110 USPQ2d at 1082 (finding single email exchange
16 between the parties insufficient to establish good faith effort). "

17 There seems to be confusion by the the IA (perhaps due to Applicant's prose) regarding
18 Applicant's motions. Applicant, in all three of his motions to compel, provided proof of THREE
19 prior email requests to Opposer that received no response whatsoever, either by phone, mail or
20 email. (See Exhibits A, B and C in each of Applicant's Three Motions to Compel). Two of those
21 email requests stated problems with the various responses to discovery requests by Opposer, and,
22 therefore, requested 'meet and confer' conferences. None of these emails were responded to by
23 the Opposer, as Applicant pointed out to the interlocutory attorney. As of this filing, there has
24 still been no response from Opposer.
25

26 Therefore, the IA's request for a proffer of at least TWO email requests was already met
27 and clearly propounded in all three of Applicant's Motions.
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1 The IA points out that two of these three unanswered emails were sent within a day of
2 each other. This is true. However, Opposer's failure to respond to a prior email inquiry, in
3 addition to the late submission of responsive documents, created an imminent deadline for
4 submission of the Motions to Compel to the TTAB.

5
6 For the record, (and Applicant also states this here in support of his contention of a lack
7 of good faith in Image 10's Opposition) that a FOURTH EMAIL request was made for
8 deposition dates which was followed by an evasive response received from Opposer stating that
9 no dates could be confirmed. As of this date, Applicant's dates remain rejected and Applicant
10 has received no alternative proposed dates from Opposer.

11 **AS TO APPLICANT'S DETAILING OF INSUFFICIENT**
12 **RESPONSES BY OPPOSER**

13
14 The IA states in her order that: *"Moreover, to the extent Applicant alleges that several of*
15 *Opposer's discovery responses are deficient, Applicant does not specify which of Opposer's*
16 *responses to Applicant's 105 document requests and 52 interrogatories he is contesting."*

17 This is untrue.

18 Applicant, in his Motion to Compel Responses to Interrogatories, made specific points
19 and arguments regarding Opposer's General Objections: **B'** (pertaining to Opposer's assertion
20 that Applicant's interrogatories were 'burdensome and designed to harass'), **C** (regarding
21 'overbreadth and not limited to a reasonable time period'), **D** (regarding 'commercial
22 sensitivity), **E** (regarding 'attorney-client privilege) and **F** (regarding 'right to privacy' by
23 Opposer's employees). (Please see pages 4 through 7 in the Motion.)

24
25 Applicant, in his motion, also made specific arguments pertaining to Opposer's General
26 Objection that stated, effectively, blanket and improper defenses of 'Attorney Privilege and
27 Work-product'. (Please see pages 6 and 7 of the Motion to Compel Responses to
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Interrogatories.)

The IA, in her decision, made no response to those arguments, either in support or derogation thereof.

Applicant also made specific references to failed Interrogatory responses, specifically Interrogatory response **#1**, (Please see page 1 of the motion), **#43, 44, 47 and 52**, (see pg. 9), **1 through 36** (see pg. 10) **#37, 47, 48, 51 and 52** (see page 11) and **#38 thru 50** (see page 12).

SPECIFICALLY AS TO DOCUMENT REQUESTS

Applicant believes his motion adequately described which responses to document requests were problematic and, therefore, contested by Applicant.

For example, Applicant, in his motion, clearly stated that Opposer's General Objection **A** ("*requests are either irrelevant or not reasonable calculated to lead to the discovery of admissible evidence*") was inappropriate, and Applicant then provided nearly one page of detailed arguments in support of this contention.

The IA seems to have ignored this.

Applicant further stated, over the course of nearly two pages, similar detailed disagreements to Opposer's General objections **B** through **E**. (Please see pages 4-6).

Applicant also objected to Opposer's general claims of "Attorney-Client privilege" and the "Work Product privilege" (Please see pages **6 & 7**).

Applicant also stated specific arguments as to the simplicity of his Interrogatory requests **1-75**, (therefore countering Opposer's statement of confusion) and then made more specific arguments pertaining to Requests **9 through 75**.

Applicant next argued that Opposer had used a 'rubber stamp' objection to **75** of Opposer's responses.

Applicant further pointed out and argued against Opposer's '*over burdensome*' claim

1 (Please see page 8).

2 Applicant, with specificity, argued against the reasons for Opposer's non-responses to
3 Interrogatories numbered **3-5, 8, 18, 53 and 76**.

4 In response to requests **3-5, 8 and 18**, Opposer stated it would produce responsive, non-
5 privileged documents.

6
7 However, as of this date, nothing has been received.

8 Therefore, reviewing the above, it seems incomprehensible, at least to Applicant, how the
9 IA could state "*Applicant does not specify which of Opposer's responses to Applicant's 105*
10 *document requests and 52 interrogatories he is contesting.*"

11 The Interlocutory Attorney further states that: "*No motion to compel may be filed unless*
12 *the parties are truly unable, after making their best efforts, to work out mutually acceptable*
13 *solutions. The Board expects both parties to cooperate with one another in the discovery*
14 *process, and looks with extreme disfavor on those who do not.*"

15
16 Applicant submits that he made his "best efforts" four times, and that Opposer has not, to
17 date, bothered to respond in any meaningful way. Additionally, Applicant asserts that Opposer
18 has not "cooperated" in the discovery process. It is impossible for Applicant to assess the claims
19 in Opposer's opposition filing without some supporting evidence, however, Opposer refuses to
20 provide any evidentiary basis for making its claims.

21
22 **MOTION TO COMPEL REQUESTS FOR ADMISSION**

23 The IA states: "*A motion to compel is not available to compel a party to respond to*
24 *requests for admission. See TBMP § 523.01 (June 2017). If a party fails to respond to requests*
25 *for admission by the deadline, as is the case here, the requests stand admitted under responses to*
26 *his requests for admission will be given no further consideration.*"

27 With respect, it appears the Interlocutory Attorney did not understand Lemorande's
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1 motion on this matter, and perhaps the IA would argue Applicant's prose was confusing. On
2 review, however, Applicant believes his statements were clear, on point, and understandable.
3 Applicant respectfully hopes that the Commissioner will be the judge of that.

4 Applicant admitted previously that his motion was mislabeled and apologized for the
5 error. However, the contents of the mislabeled motion would seem to be appropriate, regardless
6 of the misstated motion heading.
7

8 For the record, Applicant did not seek a blanket order of admissions, nor state that the
9 Opposer failed to respond to all requests. Applicant made no such claim or request but rather
10 gave detailed arguments as to the obfuscation of the majority of Opposer's responses. A few
11 requests were denied by Opposer. Nevertheless, Applicant, in his motion, believed he detailed
12 which admissions were responded to with inappropriate claims of 1) "trade secrets" and 2) "lack
13 of information" which would allow them to be admitted.
14

15
16 Applicant respectfully requests that the Commissioner reexamine these requests.
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18 **MOTION TO EXTEND DISCOVERY**

19 The IA attorney states: "*Applicant's motion to extend discovery so he may take*
20 *Opposer's deposition(s) does not specify the length of the requested extension.*"
21

22 As noted in the email evidence attached to Applicant's Motion to Extend Discovery,
23 Opposer did not respond with dates to Applicant's request for deposition dates, but rather merely
24 stated:

25 "*We will confirm available dates for our client's deposition. However, I am not*
26 *available during the time period you are requesting.*" (See **Exhibit B**, "Motion to
27 Allow Additional Time For Depositions")
28

1 As of this date, counsel for Opposer has proffered no dates, and Opposer has not
2 responded to any requests to resolve the lack of Opposer's production of documents or other
3 evidence to support Opposer's claims.

4 **AS TO APPLICANT'S *PRO SE* STATUS**

5 The IA in its response states: "*Applicant apparently intends to represent himself in this*
6 *proceeding. While Patent and Trademark Rule 11.14 permits an individual to represent himself*
7 *or herself, it is strongly advisable for a person who is not acquainted with the technicalities of*
8 *the procedural and substantive law involved in inter partes proceedings before the Board to*
9 *secure the services of an attorney who is familiar with such matters. The Office cannot aid in the*
10 *selection of an attorney.*"

11 Applicant is not sure how to respond to the commentary (and the several pages of
12 elaboration that follow). Applicant is clearly representing himself, therefore IA's words
13 'apparently intends' are unnecessary and possibly condescending.

14 Applicant believes that it is his right to seek due process in this matter, even if *pro se*.
15 Opposer has initiated its due process right to protest Applicant's trademark application.
16 However, without proper discovery, there can be no fair disposition of the matter.

17 Applicant also believes that his submissions to the USPTO and TTAB, although likely
18 inconsistent with that of a trademark attorney of many years experience, are quite possibly equal
19 to the work of many new attorneys practicing before the Board. If more than that is required, it
20 would seem considerate to *pro se* applicants to be informed that their petitions are fruitless,
21 saving time for both such applicants and the staff and attorneys of the USPTO.

22 Again, Applicant states confusion as to why the Interlocutory Attorney felt this
23 admonition and presumption of incompetence was necessary and appropriate. What is
24 worrisome is that ever since the Interlocutory Attorney's expression of dismissiveness towards
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1 Applicant's *pro se* defense to the Opposition, Opposer has been even more dismissive in its
2 treatment of Applicant, still not even bothering to respond to prior communications from
3 Applicant.

4 **RE: CERTIFICATE OF SERVICE REQUIREMENT**

5 The IA, in its decision, states "...every submission filed in a proceeding before the Board
6 ***must*** be made before the submission will be considered by the Board. Accordingly, all
7 submissions filed in this proceeding ***must*** be accompanied by a statement, signed by the filing
8 party or its attorney, attached to or appearing on the original submission when filed, clearly
9 stating the date and manner in which service was made, the name of each party or person upon
10 whom service was made, and the email address(es) to which the service copy was sent."

11 Applicant is at a loss as to why this directive was included in the IA decision, and
12 believes the Commissioner, in its hoped-for review, will see that all submissions by Opposer,
13 including the four motions submitted to the TTAB, properly included the requested Certificates
14 of Service. Why the IA did not observe this cannot be discerned or is understood by Applicant.

15 **CONCLUSION**

16 In summary, Applicant believes that the silence and stonewalling perpetrated by the
17 Opposer is- counter productive to the system designed to assess competing claims of right, and
18 that such stonewalling is being, perhaps unwittingly, endorsed and aided by the IA's order. As
19 stated in the original Motions and this document, Opposer did not nor has since responded to
20 TWO REQUESTS to MEET AND CONFER regarding discovery disputes, ONE INQUIRY as
21 to failed discovery transmission, and ONE INQUIRY as to DEPOSITION DATES.

22 In addition, if the Interlocutory Attorney's position is sustained, it would appear that
23 Applicant's attempts at fair and necessary discovery are and will always be futile, possibly
24 because of his *Pro Se* status. Applicant is obviously deep into the opposition process (one
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1 initiated, for the record by the Opposer, not by Applicant), and, therefore, clearly past the
2 'intention' and 'apparent' stage, having already consumed voluminous hours of research,
3 analysis, thought and writing constituting more than 45 pages, in the aggregate, of reasoned and
4 researched arguments) all of which Applicant asserts has been professional, diligent and
5 trustworthy.

6
7 Applicant believes the decisions stated in the Interlocutory Attorney's order leave him
8 with no other apparent option - in pursuit of fairness in the opposition process - other than this
9 Petition, especially as it seems that Applicant's *pro se* status has prejudiced the IA against nearly
10 all of the content in Applicant's motions.

11 Therefore, Applicant respectfully requests that the Commissioner require reconsideration
12 of the previously submitted motions, and, thereafter, issue a revised order, or, in the alternative,
13 transfer the matter to another interlocutory attorney.

14
15 Applicant respectfully asks that the Commissioner notice that Opposer's behavior in the
16 discovery process to date has been to deny the provision of any evidence to support Opposer's
17 claims, depriving Applicant of essential information to defend Applicant's application or
18 abandon it, perpetuating a TTAB action that should and could be resolved if such evidence of
19 superior rights owned by Opposer actually exists. As a result, both Applicant's and the TTAB's
20 time, effort and resources are possibly fruitless and wasted.

21
22 Dated January 15th, 2018

Respectfully submitted,

23
24 Rusty Lemorande
25 *Pro Se*
26 1245 Crescent Heights Blvd.
27 Los Angeles, CA 90046
28 Telephone: 1 323 309 6146

/Rusty Lemorande/
Rusty Lemorande
Pro Se

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CERTIFICATE OF SERVICE AND FILING

I hereby certify that a copy of the foregoing Petition to Commissioner was served on counsel for Image 10 LLC by e-mailing said copy, as agreed by counsel, on January 16th, 2018, to the following email address: Michael Meeks at mmeeks@buchalter.com, Farah Bhatti at fbhatti@buchalter.com, and hblan@buchalter.com.

/Rusty Lemorande/
Rusty Lemorande